VIRGINIA LAW REGISTER

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Virginia State Bar Association Meeting.

The meeting of the Virginia State Bar Association was probably one of the most slimly attended meetings held for some time, but no meeting ever had more interesting papers read before it or had better action taken looking towards reformation in our laws than the present meeting. On the first day there were only about fifty members registered, though on the last day this number ran up to about one hundred. The actual meetings of the Association, however, were lamentably small, one of the most important measures before the meeting being carried by a vote of eight to seven, showing that exactly fifteen members were present when the vote, which was a rising one, was demanded.

Judge George L. Christian's paper upon Chief Justice Taney was one of the most interesting and useful papers ever read before the Association. It brought into the clear light the magnificent character and ability of this great Justice, entitled to rank along with John Marshall, and inferior to none in the history of the justices of the court. The storm of abuse and vilification which this great man's adherence to the right brought upon him was shown in Judge Christian's masterly paper, to be absolutely unjust and outrageous. Biographical, descriptive and argumentative, it commanded from all who heard it and will command from all who will read it a tribute of admiration and praise.

The paper of Professor Raleigh C. Minor on "Centralization against Decentralization" was original and valuable, showing that the States, and especially the State of Virginia, had done much to decentralize the authority of the Executive and to take away from him as far as possible the power to execute the laws.

It was a thoughtful paper, a statesmanlike paper, and one which we would like to see read by every legislator in the State of Virginia.

On Wednesday morning Judge A. W. Wallace of Fredericksburg read an interesting and entertaining paper on the "Life and Character of Lord Brougham," and on Wednesday evening Mr. Walter H. Taylor of Norfolk read a paper on the "Abolition of Jury Trials in Civil Cases" which would have delighted the heart of one of our associate editors. Mr. Taylor made a strong plea for the abolition of jury trials in civil cases and the substitution of three judges therefor. We remember, however, on one occasion while arguing a question of fact before one of the distinguished circuit judges of this State in the olden days, we attempted to meet a somewhat demagogical argument of our opponent by saying to the judge that this argument might have some force if addressed to a jury. The judge interrupted us rather brusquely and said, "Well, sir, what am I but one juryman?"

On Thursday morning the Hon. Helm Bruce of Louisville, Ky., delivered an address entitled "A Permanent International Court," which was full of valuable information and historical matter put in a concise and forceful shape. To those who heard the speaker (for whilst his paper was written, he delivered it without the use of the manuscript and in a most eloquent manner) the ultimate establishment of such an international tribunal seemed much nearer than even the most daring might hope. It it to be deeply regretted that more of the members of the Association did not hear this superb address.

The eternal question of law reform had of course a hearing. Various committees were appointed to attempt to influence the Legislature to make various needful and salutary changes in our law. The question of expert testimony was discussed at some length and the bill submitted by Mr. Whitehead at the 1910 meeting of the Association was recommended for passage, and authority was given to print in condensed shape the report of the committee of fifteen commonwealth's attorneys on the revision of the criminal laws of the State. Leave also was given to print a form of practice act which had been drawn up by a member of the committee on Reform in Law Practice.

The social features of the meeting were as usual very pleasant, but there was a query (put by a good many people in a very

querulous way) as to why the Association continued to meet at the Hot Springs?

The "Federation of the World."

The question of an International Court of Arbitration may seem to some very far off but that there is a tendency towards unification of law amongst all civilized nations cannot be questioned. On the Continent of Europe there is at present afoot a movement for bringing about uniformity in the judicial practice of different nations. At the conference at the Hague on the Bill of Exchange Law last year a scheme was drawn up for a uniform law of Bills and Notes which was accepted by the representatives of all the powers except Great Britain. The delegates of that power, while not approving the general scheme, suggested certain changes in the law of England to bring it into correspondence with the provisions of the proposed uniform law, such as abolition of days of grace, fixing the rate of interest and prohibition of payment for honor by the acceptors of a bill.

The matter will come up for re-discussion at the meeting of the Conference during the present month. This conference is not composed entirely of lawyers: merchants, bankers, judges, lawyers, ministers and diplomatic representatives compose it. The air seems clear for two great systems relating to bills: the Continental and the Anglo-American. In our own country nearly all the states have adopted a uniform law of Bills and Notes, based very much upon the English Act. Now if the Continent of Europe adopts uniformity in this law we have every reason to expect a common ground upon which Europe, Great Britain and America may meet and all points of conflict be removed.

Conservation of Natural Resources vs. Interstate Commerce.

The new State of Oklahoma, as we have heretofore observed in the REGISTER is making itself felt in the Supreme Court of the United States and as a general rule is finding its experiments in legislation decidedly unfortunate. By an act of its Legislature it provided that all firms, corporations, etc., could only be-

come bodies corporate for the producing, transmitting or transporting of natural gas to points within the state by complying with the general corporation laws of the state and the act itself. This act refused the right of eminent domain to any corporation engaged in such transmitting or transporting natural gas to points without the state. The Kansas Natural Gas Company and others brought various actions, the nature of which need not be particularized, to declare this act unconstitutional and the lower court held the act to be "unreasonable, unconstitutional, invalid and void, and of no force or effect whatever. West *v.* Kanawha Nat. Gas Co., decided at the October term, 1911. The Supreme Court of the United States sustains the lower court and decides in effect practically that no state can prohibit a foreign corporation from entering its borders, doing business within it, or exercising the right of eminent domain if such corporation is engaged in interstate commerce. J. J. Holmes, Lurton and Hughes dissent. The State contended that the statute's "ruling principle is conversation, not commerce; that the due process clause is the single issue." And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the state. The provisions of the act, it is further insisted, are but an exercise of the police power to conserve the natural resources of the state, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the state, and the use of the highways of the state confined to pipe lines operated by domestic corporations, in order that gas may be transmitted only between points within the State. And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly.

The Supreme Court in its opinion said:

> A paradox is seemingly presented. Interstate commerce in natural gas is absolutely prevented—prohibited in effect, for we think it is undoubted that pipe lines are the only practical means of gas transportation, and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. Pipe line construction is confined to corporations organized under the laws of the State, and the condition of their incorporation is that they shall only transmit gas between points in the

> State, and shall not transport to or deliver to corporations or persons engaged in transporting or furnishing gas to points outside of the State. The right of eminent domain is given alone to such corporations, and the use of the highway is confined to them; and that there be no element of control over them omitted, a violation of the statute is punished by a forfeiture of charters and of property. Nor can a new corporation be formed if even one of its stockholders was a stockholder of an offending corporation.
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> "To such stringent subjection foreign corporations could not be brought, so they are absolutely excluded from the state by the following provision: Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct business within this state."

The Court seems fully aware of the gravity of the question, stating frankly that it might be conceded for the purpose of breaking down the isolation between the states that Congress could grant the right to take private property and subject the highways of the states against their consent to the uses of interstate commerce. In other words that the Pennsylvania Railroad could come into the State of Virginia and condemn land for the purpose of building a road through the State without so much as saying by your leave. For this is the effect of the decision. If a pipe line can do it to transport natural gas, why cannot a railway do it to transport coal or timber or manufactured goods? For the Court approves this language:

"Natural gas when brought to the surface and placed in pipes is a commercial product. If it can be kept within the State after it has become a commercial product so may corn, wheat, lead and iron, and if laws can be enacted to prevent its transportation" a complete annihilation of interstate commerce might result. State ex rel. Corwin v. I. & O. Oil, Gas & Min. Co., 120 Ind. 576. That the *taking* of natural gas can be regulated under the police power the court seems to admit, but the police power has to yield to Interstate Commerce in its *transportation*. The conclusion of the whole matter is "No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

It is not uninteresting to read this case in connection with Greer *v.* Connecticut, 161 U. S. 519. This latter case held—JJ. Field and Harlan dissenting, and Peckham and Brewer not sitting—that a state could lawfully prohibit the transportation of game killed within its borders to any other state. The majority of the Court held that "common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." The property referred to was game which had been killed. The Court in this last case also quotes with approval Chief Justice Marshall's language in Gibbons *v.* Ogden. "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." The Court then says: "The power of a state to control the killing of and ownership in game being admitted, the commerce in game which the state law permitted was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was part of it."

Now it has been decided over and over again that natural gas, like animals *ferœ naturæ,* is not a commercial product as long as it is not reduced into possession—so to speak—that is brought to the surface of the earth, and the Supreme Court approves a case which prohibited taking of gas under a greater pressure than 300 pounds to the square inch; and has also in Lindley *v.* Natural Carbonic Gas Company, 220 N. S. 61, approved a state statute to prevent the waste of gas. It requires very ingenious reasoning to reconcile this West case with the reasoning and result of these decisions and the "police power" is gently waived aside. But who can reconcile any of the cases where the magic wand of "interstate commerce" is wielded?

Rational Growth of the Law.

It is a very curious thing to take the average newspaper of to-day and read both in its editorial columns and in articles from correspondents the views of laymen upon the duties of judges in respect to the construction of laws which are brought before the courts. It seems to us that there is a great need of education upon the fundamental principles of our government amongst the masses and that those of our schools which profess to teach the science of government must do it in a very perfunctory way. There seems to be a general idea that judges in passing upon a statute should broaden or limit it to meet popular demand and that no act ought to be declared unconstitutional by the courts which a majority of the people wish to have sustained. In other words, that the courts ought to "legislate" or shift and veer their decisions to suit the popular clamour. The loud demand in some quarters for the "recall" of judges—which recall has been made a part of the Constitution of one of the territories asking for statehood—is but a clearer expression of this view.

No one can deny the right of the people to lawfully adopt any policy which they may approve, either by an amendment to the Constitution or the passage of any act not contrary thereto. But the Constitution being amended the Court has nothing to decide except as to the construction of the amendment, if legally made. And when an act is passed the courts are by the very power which created them limited to the constitutionality of the act, and that being decided favourably, to its construction. Fixed and well determined rules have been established for such construction. For the Court to attempt to "make law" is an encroachment upon the Legislative function which is absolutely forbidden under our form of government and no greater evil can befall us than to have the Legislative and judicial function in the slightest degree intermingle. "Judge made law" is not *law*. It is usurpation. And yet we find a former President of the United States arguing for a "rational growth" of the law—urging that courts should "act with ordinary statesmanship as a living aid to growth, not as a straightjacket," and with that cool sense of omnipotence which seems to pervade the "cosmos of his ego," he proceeds to dismiss those judges who do not agree with

him as to his construction of the "Workmen's Compensation Act" with the following paragraph:

"I wish to state with all emphasis that no man who takes the opposite ground to that which I have taken in the article in question has any right to be on the bench; and it is a misfortune to have him there."

This is the "recall" with a vengeance, and is a fair indication of how such a law would act.

It is needless to speak to lawyers of the damage of such doctrine. They know that the only rational, wise and judicious "growth of law" is through well considered legislation, answering to a wise popular demand and need, and that no judicial decision should ever attempt any change, alteration or nullification of a law legally enacted in accordance with the Constitution. There is great need of popular education on these questions. It is the duty of the lawyers to discuss them fearlessly, openly and frequently, losing no opportunity to impress upon the minds of the people the danger which threatens their own liberty and property rights when the Legislative and judicial functions are not kept severely and strictly apart, and when the independence of the judiciary is threatened in any way. And upon our judges is laid the weight of an additional burden to see that by no act or ill conceived or loosely expressed opinion they trench upon the only power which can *make* law—the Legislative branch of the Government.

False Imprisonment.

The attention of the public has been rather sharply called to a great injustice in the law in the case of Andrew Toth, who was convicted of murder in the State of Pennsylvania, sentenced to imprisonment in the penitentiary and actually served twenty years. His absolute innocence has been established and he has been released, old, penniless and unable to get work.

The State Legislature declined to make any compensation, but Mr. Andrew Carnegie has pensioned him at $40 per month and he is to return to his native land, Hungary.

Had this man been imprisoned at the instance of a private per-

son for twenty-four hours in jail and such imprisonment been shown to be false and malicious he could have recovered ample damages. But in his present situation he is without redress and the strong arm of the law which has taken out of his life twenty years, caused him to endure shame, suffering and humiliation, is withdrawn from him and he goes forth an outcast and a beggar, only saved from actual want by private charity. Is this a condition of affairs which should exist in a civilized country, boasting of men's equality before the law? In a late number of the REGISTER we spoke of the propriety of a law allowing a man tried for an offence against the Commonwealth and acquitted, an allowance for costs. We believe such a law should be passed, despite the fact that there is no precedent in history for it.

But in a case like Toth's it seems to us there can be no question that the State should compensate the man and that a general act should be passed permitting a man who has suffered at the hands of the law for a crime of which he was innocent, compensation to be fixed by a court of justice upon good cause shown.

We have a precedent in an English case which occurred only a short while since. A man named Beck was convicted of a crime, was suffering a term of imprisonment and was then proven to be entirely innocent. He was allowed a sum equivalent to $25,000 by the Crown, along with his pardon.

The great infrequency of such case in no way renders the responsibility of the Government any less.

It may be expedient that "one man should die for the people," but it is not any juster today than it was in the day of the High Priest who plead it in extenuation of the greatest crime in history; and if compensation cannot restore, it can at least exhibit a willingness to do all that can be done to right an injustice and grievous wrong.

Law against Dishonest Trading.

Germany has passed a law which endeavors to put down dishonesty in trade to a greater extent than has yet been attempted elsewhere. By the new law a person is liable to fine or imprisonment, "(a) if he advertises as 'bankrupt stock' goods which have ceased to form part of the bankrupt's estate; (b) if he advertises a clearance sale, not being a regular seasonal

sale, without indicating the true reason; (c) if he includes in a clearance sale goods bought specially for the purpose; and (d) if he holds such a sale otherwise than in accordance with the Government regulations."

The effect of such a law in this country would be of course exceedingly cruel to a large and thrifty class of our population. But why should not fraud and deceit in attracting custom be punished as well as fraud and deceit in a sale? The fraudulent intent in one case is as great as in the other, and now that we have taken an excellent step towards aiding honest merchants in the Sales in Bulk Act, why should we not go a step forward and pass an act similar to the German Act in all respects save as to the last clause?